

Rulemaking

Division of Administrative Rules

5 May 2016

Goals today

- learn about administrative rulemaking and administrative rules
- learn about the proposed rule process
- learn about how to write rules

Rulemaking and rules

Rulemaking

Rulemaking is delegated lawmaking power from the legislature to administrative agencies; agencies must be **authorized** to do rulemaking.

Rules

- Rules as law: an agency's written statement that:
 - is explicitly or implicitly required by law
 - implements or interprets a legal mandate
 - applies to a class of persons or another agency
- Rules as part of administrative code
 - title
 - **rule**
 - section

When do we *have* to write rules?

- Whenever your agency is required to by law; or
- Whenever your agency's action:
 - *authorizes, requires, or prohibits* an action;
 - *provides or prohibits* a material benefit;
 - applies to a class of persons or another agency; *and*
 - is explicitly or implicitly authorized by statute

Proposed rule process

Purpose

The proposed rule rulemaking process is designed to make permanent, substantive changes to the Utah Administrative Code.

Governing law

- Title 63G, Chapter 3, the Utah Administrative Rulemaking Act
- Title R15, rules of the Division of Administrative Rules
- E.O. No. 13 “Establishing Effective Oversight Over State Agency Rulemaking” (December 6, 2011)
- any law specific to the rulemaking agency

Types of proposed rulemaking actions

- enacting a new rule
- amending an existing rule
- repealing an existing rule
- repealing and reenacting an existing rule

Preproposal phase

Establishing need

- legislation (E.O. No. 13)
- internal agency review
- public comment
- agency adjudication establishing a principle of law
- petition to engage in rulemaking
- federal direction

Establishing need: legislation

- E.O. No. 13: review legislation by June 1
- Subsection 63G-3-301(13)(b): 180 days after effective date of bill to initiate rulemaking

Determining authorization

- may be *explicit*
- may be *implicit*, meaning “The only way I can do this thing the legislature wants is by writing a rule.”

Explicit authorization example

The department **shall make rules** in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act...specifying procedures for the application...of certificates of registration... (emphasis added; see Section 4-37-109).

Implicit authorization example

The Division of Administrative Rules shall...**establish all filing, publication, and hearing procedures** necessary to make rules under this chapter... (emphasis added; see Section 63G-3-402).

Information gathering

- administrative record
- affected persons
- small business fiscal impact
- fiscal and non-fiscal impacts
- fiscal impact on business, department head

Administrative record

- report of the agency's decision-making process
- proposed rule text and the rule analysis form
- public comment received and recorded by the agency during the public comment period
- agency's analysis of the public comment

Involve affected persons

- required by the Rulemaking Act
- supported by E.O. No. 13

Small business fiscal impact

- establish less stringent compliance or reporting requirements; or
- establish less stringent schedules or deadlines; or
- consolidate or simplify reporting or compliance requirements; or
- establish performance standards rather than design or operational standards; or
- exempt from all or any part of the requirements

Fiscal and non-fiscal impacts

Determine the **fiscal** and **non-fiscal** impacts and burdens a rule may **directly** or **indirectly** have on the following classes:

- state budget;
- local governments;
- small businesses; and
- persons other than small businesses, businesses, or local governmental entities

What are fiscal impacts?

- any impact or burden that has a price tag; can be positive or negative:
 - requiring the purchase of a piece of equipment
 - requiring continuing professional education
 - requiring data be submitted in a particular format

How to report

- if possible, provide **exact figures** of the incremental cost or savings in dollars and clearly identify if a cost or savings; or
- if exact figures are not available, provide an estimate of the incremental cost or savings in dollars and clearly identify it as a cost or savings

In either case, provide the information in terms of an aggregate figure for each class

Can't determine fiscal impact

- provide a “reasoned narrative description of cost-related actions”; and
- explain why the narrative is substituted for the cost

There isn't a fiscal impact

- explain how the agency determined there would be no cost or savings; or
- explain why the rule doesn't apply to one or more of the classes.

What are non-fiscal impacts (E.O. No. 13)?

- Any impact or burden that doesn't have a price tag:
 - requiring information that persons may wish to protect (privacy issues)
 - prohibiting forms of expression (speech, expression, conscience issues)
 - removing parental-notification requirements (parental rights in health, human services, or education issues)

State budget

- your agency
- other agencies that you regulate (DTS and DHRM regulate this way)
- any other costs to the state (remember direct or indirect)

Local governments

- counties
- cities and towns
- school districts
- special districts

Small businesses

Small businesses have fewer than 50 employees

Persons

- a “person” is “any individual, partnership, corporation, association, governmental entity, or public or private organization of any character other than an agency”
- “person” includes non-profit organizations
- with regards to fiscal and non-fiscal impacts or burdens, “person” **does not** include: small businesses, businesses, or local governmental entities

Compliance costs for affected persons

- *Only* costs
- *Individualized* (not aggregate)
- *Persons* here means:

...any individual, partnership, corporation, association, governmental entity, or public or private organization of any character other than an agency.

Fiscal impact on business, department head

- must be comments *by* the department head
- comments should be written in first person
- comments may not be “I have no comment”

Who is the department head?

- *division, office, or bureau, that is a constituent part of a department:* chief executive officer of parent department
- *department:* chief executive officer of parent department
- *commission or a board created within a department:* chief executive officer of parent department
- *institution of higher learning:* president of institution
- *legislatively created function or constituent agency in the office of one of the five elected officers of the executive department:* the elected officer

Fiscal and non-fiscal impact review (E.O. No. 13)

- review with:
 - board or commission
 - advisory or rulemaking power

Review by administrative rules coordinator (E.O. No. 13)

- rule contains *necessary* language and is actually a rule
- rule was drafted using “logical, understandable, and concise language”
- interested parties have been given opportunity to participate
- standards within the rule “reflect consistent and sound...regulatory policies”
- rule is formatted according the *Rulewriting Manual for Utah*

Proposal phase

Prepare rule analysis

- purpose of the rule or reason for the change
- summary of the rule or change
- aggregate cost or savings information (including *non-fiscal* impacts)
- compliance costs for affected persons
- department head comments on fiscal impact on business
- legal authority for the rule
- comment date; and
- may become effective date

Purpose or reason

- why are you making, amending, or repealing the rule?
- report the determination you made earlier (Stage 1: Pre-filing and pre-publication)

Purpose: Good example

...[T]he Air Quality Board is seeking public comment on a a wintertime seasonal solid fuel burning ban... The seasonal wood burning ban is being proposed because the Wasatch Front and the Cache Valley routinely violate the federal health-based standard for particulate matter, and solid fuel burning has been found to be a significant contributor to that problem... (amendment, R307-302, 1/1/2015 Bulletin.)

Summary

- provide enough information that a reader can see what's going on
- do not provide so much information that you repeat the entire rule or amendment
- if repealing the rule: a brief summary of the repealed rule
- if repealing and reenacting: summary of substantive differences between the two versions

Summary: Good example

The proposed change to Section R313-28-31 adds a new Subsection R313-28-31(6). This subsection outlines the requirements that apply to the use of hand-held medical x-ray equipment, as well as some regulatory exclusions... (amendment, R313-28-1, 1/15/2015 Bulletin.)

Cost questions

- report fiscal and non-fiscal impacts
- aggregate cost or savings
 - state budget
 - local government
 - small businesses
 - other persons
- compliance costs for affected persons

- department head comments regarding business

Cost questions (cont.)

- aggregate cost or savings
 - remember the analysis done earlier regarding fiscal and non-fiscal impacts
- compliance costs for affected persons
 - report *only* compliance costs
- department head comments regarding business
 - remember the analysis done earlier
 - only the department head (cabinet-level official or equivalent)
 - only with regards to business, large and small

Legal authority

- reference to the Utah Code (*must exist*)
- reference to the Utah State Constitution
- reference to the Code of Federal Regulations or Federal Register
- reference to the United States Code or a public law; or
- reference to a state or federal court case
- must match what's at the bottom of the rule

Comment date

- comment date **must be no fewer** than 30 calendar days after publication
- comment date **must be no more** than 113 calendar days after publication
- handy-dandy table to help you calculate:
<http://www.rules.utah.gov/agencyresources/timeframes.htm>.
- comment date entered on rule analysis *binds* you to at least that date

May become effective date

- effective date **may not be fewer** than 7 calendar days after the close of comment
- effective date **may not be more** than 120 days after publication

Prepare the rule text

Three fundamental rules:

- simplicity
- consistency
- clarity

Guidelines for rule text

- keep in mind the purpose of the rule (avoid scope creep)
- outline the rule (to help structure it)

- write the rule in the present tense (the rule speaks to the enforcer and the object in the *now*)
- write in an active voice: identify an actor who does something
- couch actions and obligations in a positive rather than a negative construction

Guidelines for rule text (cont.)

- write in the singular rather than the plural
 - helps with consistency and removes ambiguity
 - rules of statutory construction indicate that the singular includes the plural
- use gender neutral language
- refrain from quoting statute in rule

Incorporation by reference

The method of making one document of any kind become a part of another separate document by alluding to the former in the latter and declaring that the former shall be taken and considered as a part of the latter the same as if it were completely set out therein. (The Free Dictionary, Legal Dictionary)

...

In other words, it's a *cheat*

What may be incorporated?

- all or any part of another code, rule, or regulation that has been adopted by a federal agency, an agency or political subdivision of this state, an agency of another state, or by a nationally recognized organization or association
- state agency implementation plans mandated by the federal government for participation in the federal program
- lists, tables, illustrations, or similar materials that are subject to frequent change, fully described in the rule, and are available for public inspection
- lists, tables, illustrations, or similar materials that the director determines are too expensive to reproduce in the administrative code

How to incorporate by reference?

- state that the referenced material is incorporated by reference
- state the date, issue, or version of the material being incorporated
- define specifically what material is incorporated by reference and identify any agency deviations from it

Word processor and file format

- don't care *what* word processor; *but*
- make sure to save in Rich Text Format (RTF)

Structure: Purpose and authority

- follow the recommended structure of a rule found in the [Rulewriting Manual for Utah](#)

- first section: purpose of the rule
- second section: authority for the rule (similar to the information provided in the rule analysis)
 - Utah Code (always; must have)
 - Utah State Constitution (possible; usually Tax Commission or Education)
 - federal law
 - court case; federal or state

Definitions and the rest

- third section: Definitions (if necessary)
 - refer to definitions in the statute (“Terms use in this rule are defined in Section 63G-3-102...”)
 - define words, acronyms, abbreviations that might not be widely understood, or are being used in ways different than their original meaning
 - **do not** redefine word, acronyms, abbreviations, terms that have already been defined in the statute the rule implements
- subsequent sections: the body of the rule; the various subjects pertaining to the regulatory topic at hand

Numbering within sections

- first level: **(1)** Arabic numeral in parentheses
- second level: **(a)** lower case letter in parentheses
- third level: **(i)** lower case roman numeral in parentheses
- fourth level: **(A)** upper case letter in parentheses
- fifth level: **(I)** upper case roman numeral in parentheses
- sixth level: **(Aa)** upper case letter and lower case letter in parentheses

Mark up in the rule text

- underline text you wish to add
 - bracket and strike through text you wish to delete
 - replacing words, phrases, sentences: bracket and strike through the material to remove, then immediately underline the replacement text
-

```
R15-9-9. . . Test Section.¶
  → (1) . . . [This is old text to remove.] This is new text to add.¶
[→ (2) . . . This is a subsection to remove.¶
] → (2) . . . This is the subsection that replaces it.¶
```

Example of text mark up

Formatting the top

- title, rule, and section numbers and catchlines appear in bold:

R15. Administrative Services, Administrative Rules.

R15-1. Administrative Rule Hearings.

R15-1-1. Purpose.

Formatting the bottom

- annotative material at the bottom of the rule appears in bold

KEY: administrative law, government hearings

Date of Enactment or Last Substantive Amendment: June 1, 1996

Notice of Continuation: September 21, 2010

Authorizing, and Implemented or Interpreted Law: 63G-3-402

Formatting subsections

- all subsections (paragraphs) begin with a tab; **no indents** (the right facing arrow represents the tab character):

→This is text.

- all subsections (paragraphs) begin with a subsection designator (remember sub-numbering earlier?) **unless** there is only one subsection in a section:

→(1) This rule establishes procedures and standards for administrative rule hearings as required by Subsection 63G-3-402(1)(a).

Formatting subsections (cont.)

- all subsections end by pressing the Enter key; the last subsection of a section is followed by a blank line:

→(1) This is a subsection that also happens to be the last subsection of a section.¶

¶

R15-1-2. The Next Section.

Formatting tables

- tables are preceded by a blank line and begin with the word “TABLE” in uppercase and centered
- data columns are created using spaces; **NOT** tabs or the word processor table function
- each row ends by pressing the Enter key
- the table ends with a blank line with a centered empty paragraph

```
→                                     TABLE¶
¶
FINE·SCHEDULE¶
¶
FIRST·OFFENSE¶
¶
Violation·····Fine¶
58-1-501(1)(a)·····$·500.00¶
58-1-501(1)(c)·····$·800.00¶
58-1-501(2)(o)·····$·0·--$250.00¶
¶
SECOND·OFFENSE¶
¶
58-1-501(1)(a)·····$1,000.00¶
58-1-501(1)(c)·····$1,600.00¶
58-1-501(2)(o)·····$251.00·--$500.00¶
¶
THIRD·OFFENSE¶
¶
Double·the·amount·for·a·second·offense·with·a·maximum·amount¶
not·to·exceed·the·maximum·fine·allowed·under·Subsection¶
58-1-502(2)(j)(iii).¶
→                                     ¶
```

A correctly formatted table

Formatting: special characters

- you *may not* use special symbols or letters from non-Latin alphabets
- you *may* use superscript and subscript:
 - when raising to a power: 10^3
 - when writing an equation: $y=mx + b^2$
 - when expressing a series: $x_1, x_2, x_3...x_n$
 - when expressing a chemical formula: H_2O
- you *may not* use superscript to show an ordinal number:

- not “the 3rd of the month” **but** “the 3rd of the month”

Distribute the rule analysis

- occurs either *before* or *at the same time* the proposed rule is filed;
- *agency* distributes to:
 - all persons who have made timely request for advance notice of rulemaking
 - all persons who by statutory mandate should receive notice
 - all persons who by **federal** mandate should receive notice; or
 - all persons who **in the judgment of the agency** should receive notice

File the rule analysis and text

- use eRules;
- complete the form
- add the marked-up RTF file
- submit to DAR

Publication and comment

Bulletin and Digest

- Utah State Bulletin
 - web publication; \cong 1,000 page visits/month; full text (usually)
 - paper publication from Legislative Printing Office; also full text (usually)
- Utah State Digest
 - email publication
 - summary of Bulletin contents; no text

Accepting public comment

- *at least* 30 days
- begin counting the day after publication
- helpful table at <http://www.rules.utah.gov/agencyresources/timeframes.htm>
- may hold a hearing during the comment period

Considering public comment

- consider all comment submitted in *writing* during comment period
- consider all comment provided at public hearings conducted during the comment period
- Seven-day evaluation period after close of comment

Administrative Rules Review Committee

- reviews rules for:
 - statutory authorization

- compliance with legislative intent
- impact on the economy
- impact on government operations (state and local)
- impact on affected persons
- may invite you for a chat

Public petition for hearing

- ten persons, or group with ten members, or state agency
- petition received in writing not more than fifteen days after publication
- hold hearing no less than seven days nor more than thirty days after receiving petition
- *always* hold before the rule becomes effective

Post proposal phase

Adopting the proposal

Rules do not become effective automatically

Rules Do Not Become Effective Automatically

RULES DO NOT BECOME EFFECTIVE AUTOMATICALLY

To make a rule effective:

- file a notice of effective date using eRules (this makes the rule effective and enforceable)
- notice must be received no earlier than seven days after close of comment; no later than 120 days after publication
- notice of effective date published in next issue of Bulletin

Publishing the final rule

- when effective, codified
- administrative code updates published monthly

Enforcing the rule

- enforceable as soon as made effective
- Administrative Rules Review Committee (in a constituent-services role, as well as role described earlier)
- public petition to engage in rulemaking
- judicial review

Judicial review

- petition in district court

- court reviews the rule:
 - violation of constitution or statutory law
 - agency authority to write the rule
 - substantial evidence supporting rule—**administrative record**
 - procedural validity

Rulemaking Resources

Online resources

- about the Rulemaking Process: <http://www.rules.utah.gov/abtprocess.htm>;
- the Rulewriting Manual for Utah: <http://www.rules.utah.gov/agencyresources/manual.htm>;
- the Utah Administrative Rulemaking Act: <http://www.le.utah.gov/UtahCode/section.jsp?code=63G-3>;
- UT Adm. Code Title R15: <http://www.rules.utah.gov/publicat/code/r015/r015.htm>;
- E.O. No. 13 “Establishing Effective Oversight Over State Agency Rulemaking” (December 6, 2011): <http://www.rules.utah.gov/execdocs/2011/ExecDoc151876.htm>;
- eRules help: <http://www.rules.utah.gov/eRules/help.htm>.

Real people resources

- staff at the Division of Administrative Rules;
- agency counsel.